## APPENDIX A

THE PEOPLE OF THE STATE OF NEW YORK, Respondent

v.

JOSEPH NISONOFF and MAX J. WEINSTEIN, Appellants.

Decided December 30, 1944.

CONWAY, J. The defendants were convicted of the crime of manslaughter in the first degree. The indictment charged that they, acting in concert with another, had willfully and wrongfully used and employed a certain instrument upon a woman pregnant with child, in order to procure a miscarriage, without any necessity to preserve her life and by the use of such instrument inflicted mortal wounds which resulted in her death.

There is but one question presented for our consideration, and that is whether it was error to admit in evidence the autopsy findings of the Assistant Medical Examiner who had died prior to the trial of appellants. That has become important because of a constitutional amendment which became effective on January 1, 1939. Prior to that amendment there would have been no question as to the admissibility of the findings, for the right of the accused to be confronted with the witnesses against him was a matter of statute (Code Crim. Pro., §8; Civil Rights Law, §12), and both the common law and other statutes permitted their introduction in evidence (Civ. Prac. Act, §§367, 374a). By the constitutional amendment of 1938, the right of confrontation was written into article I, section 6. The question is whether that made the autopsy findings inadmissible, in view of the death of the reporting official.

The autopsy was performed on November 18, 1942, by the Assistant Medical Examiner. While he was perform-

ing the autopsy, he dictated his findings to a stenographer and typist attached to the office of the Medical Examiner. They were subsequently transcribed and a report prepared which was signed by the Assistant Medical Examiner and filed in the office of the Medical Examiner. So much of the report as contained the findings was offered and received in evidence. The opinion contained in the report was not offered. The Chief Medical Examiner was called to give opinion testimony as to the cause of death, based upon those findings.

New York City Charter, sections 874, 875, provide that an Assistant Medical Examiner must be a "doctor of medicine and a skilled pathologist and microscopist". It has not been argued here that the Assistant Medical Examiner did not possess those statutory qualifications.

Section 879 of the Charter provides: "It shall be the duty of the chief medical examiner to keep full and complete records in such form as may be provided by law. The chief medical examiner shall promptly deliver to the appropriate district attorney copies of all records relating to every death as to which there is, in the judgment of the medical examiner in charge, any indication of criminality, and such records shall not be open to public inspection."

Section 878-3.0 of the Administrative Code of the City of New York provides: "If the cause of such death shall be established beyond a reasonable doubt, the medical examiner in charge shall so report to his office. If, however, in the opinion of such medical examiner, an autopsy is necessary, the same shall be performed by a medical examiner. A detailed description of the findings *written during the progress of such autopsy* and the conclusions drawn therefrom shall thereupon be filed in his office."

Section 879-1.0 of the Administrative Code provides: "Records shall be kept in the office of the chief medical examiner, properly indexed, stating the name, if known, of every person dying under the circumstances described in section eight hundred seventy-eight of the charter, the

place where the body was found and the date of death. To the record of each case shall be attached the original report of the medical examiner and *the detailed findings of the autopsy,* if any. The appropriate district attorney and the police commissioner of the city may require from the chief medical examiner such further records, and such daily information, as they may deem necessary."

Civil Practice Act, section 367, now provides, and so provided prior to the adoption of our Constitution of 1938, as follows: *"Certificate of officer as evidence of facts.* Where a public officer is required or authorized, by special provision of law, to make a certificate or an affidavit touching an act performed by him, or to a fact ascertained by him, in the course of his official duty; and to file or deposit it in a public office of the state; the certificate or affidavit so filed or deposited, or an exemplified copy thereof, is presumptive evidence of the facts therein alleged, except where the effect thereof is declared or regulated by special provision of law."

The right of confrontation imports and confers the right of cross-examination. When that right was added to our State Constitution, there was eliminated the possibility of its deprivation by legislative act. When we interpret that addition to the Constitution, we must do so in the light of the law as it existed at the time of the change. Any exceptions to the right of confrontation or cross-examination existing prior to the adoption of the State constitutional provision and not contrary to its spirit, must be respected. (*Mattox* v. *United States,* 156 U. S. 237, 243.) In that case, speaking of the Constitution of the United States, the court used the following language (p. 243), which is particularly applicable here: "We are bound to interpret the Constitution in the light of the law as it existed at the time it was adopted, not as reaching out for new guaranties of the rights of the citizen, but as securing to every individual such as he already possessed as a British subject—such as his ancestors had inherited and defended since the days

of Magna Charta. Many of its provisions in the nature of a Bill of Rights are subject to exceptions, recognized long before the adoption of the Constitution, and not interfering at all with its spirit. Such exceptions were obviously intended to be respected. A technical adherence to the letter of a constitutional provision may occasionally be carried farther than the safety of the public will warrant."

The right of an accused in a criminal action to be confronted by the witnesses who testify against him, is not violated by the introduction of so-called public documents or official records required to be kept. (*Heike* v. *United States,* 192 F. 83, 94, 95, affd. 227 U. S. 141; *Commonwealth* v. *Slavski,* 245 Mass. 405, 414, 415, 417; *People* v. *Reese* (1932), 258 N. Y. 89, 96; *People* v. *Corey,* 157 N. Y. 332; 5 Wigmore on Evidence, Sec 1398, pp. 136, 141, 142; Richardson on Evidence (6th ed.), Secs. 615, 616, 646, 647.)

The case of *Heike* v. *United States* (*supra*) is important since the right of confrontation is guaranteed by the Sixth Amendment to the Constitution of the United States. While that amendment is not a restraint upon the powers of the States (*People* v. *Bromwich,* 200 N. Y. 385-389), the United States Supreme Court decision is helpful in solving our problem here.

In *People* v. *Reese* (*supra,* CARDOZO, Ch. J.), we pointed out that our statutory rule of confrontation had never been deemed to require "the exclusion of certificates of records made by a public officer in the course of his official duty."

Referring to the requirement of confrontation, Professor Wigmore points out at section 1398, page 141 (*supra*):

"It follows equally that the constitutional provision does not exclude evidence admissible by way of exception to the Hearsay rule.

"The use of dying declarations has been often thus passed upon, and without any dissenting rulings.

"A like consequence must of course follow for the other exceptions to the Hearsay rule; it has been expressly sanctioned for official statements * * *."

In *People* v. *Corey* (157 N. Y. 332) an ante-mortem statement of the deceased was read in evidence on behalf of the People. Defense counsel objected to that evidence as "incompetent, improper and hearsay," and urged on appeal that "dying declarations, although competent at common law, are no longer competent, because the Code of Criminal Procedure, in prescribing the rights of the defendant in a criminal action, provides that he is entitled 'to be confronted with the witnesses against him in the presence of the court'" (p. 347). We said (WANN, J., at pp. 347-8): "We do not think the legislature intended to abolish the rule governing the admission of dying declarations, and such certainly has not been the understanding of the profession or the courts. We are not aware that this question has ever been raised before in this state, and yet the Criminal Code has been in force for nearly twenty years, and the Revised Statutes, which contain a similar provision, for nearly seventy years. (1 R. S. 94, Sec. 14.) The right of the accused to be confronted with the witnesses against him has always been a part of the Bill of Rights, and yet dying declarations have been received in evidence for time out of mind. The legislature doubtless intended to confer upon a defendant in a criminal action the right to be confronted with any living witness against him. It is upon this ground that the objection to the introduction of such declarations in evidence against a defendant, based on his constitutional right to be confronted with the witnesses against him, has been uniformly overruled in those jurisdictions where such constitutional provisions are in force. It is invariably held that the deceased is not a witness within the meaning of such a provision or of the Bill of Rights, and that it is

sufficient if the defendant is confronted with the witness who testifies to the declaration. (Citing cases.)"

While appellants concede that there is a recognized exception to the hearsay rule, in that certain public records may be received in evidence, they contend that no part of the autopsy report may be received because it is not a public record in view of the provision of New York City Charter, section 879, quoted (*supra*), that it "shall not be open to public inspection." In other words, it is argued that it is a condition precedent to admissibility that the record offered be available for inspection by the public, since that insures the accuracy and trustworthiness of the record. The only records not open to public inspection under the applicable statute here, are those delivered to the District Attorneys relating to deaths where there is indication of criminality. That is a proper exercise of the police power and in aid of law enforcement. The construction urged is too narrow. (See 5 Wigmore on Evidence, Secs. 1630, 1632, 1634.) Suffice it to say, as to the autopsy findings, that they were contained in a report filed in a public office by a public officer for a public purpose embodying facts required by statute to be stated therein. That was sufficient, although in the public interest they were available only to public officials.

The judgment should be affirmed. (See 294 N. Y.——.)

LEHMAN, Ch. J., LOUGHRAN, RIPPEY, LEWIS, DESMOND and THACHER, JJ., concur.

Judgment affirmed.

## APPENDIX B

"I hereby certify that I, Dr. Louis L. Lefkowitz, have performed an autopsy on the body of Madylon Patricia McGeehan at Fordham Morgue on the 18th day of November 1942 at 2:30 P. M.

"Autopsy performed by Dr. Louis L. Lefkowitz, assistant medical examiner, in the presence of Detective I. J. Gannon, Shield No. 1227 of the Bronx Homicide Squad. Also Detective Thomas Farrell, No. 332 of the 41st Squad.

"A number of photographs of the body were taken by Detective Michael Wilson, Shield No. 583 of the Bronx Homicide Squad. Also photo of uterus and foetus.

"Autopsy: Body of that of a white adult female, about stated age; fairly well developed and nourished. Dark brown hair on head. Brown eybrows and eyelashes; teeth in good condition. There is bloody fluid oozing from the nose. Frothy oedema in the mouth.

"Breasts are enlarged, firm. The nipples and areoloe are brown. Glands of Montgomery present. On pressure, milky secretion exudes from both. Dark brown hair on pubes. Abdomen is distended. Rigidity is complete. Postmortem lividity present on the back. Finger nails well kept, and manicured. Finger tips covered with ink (finger-printing). There is a small ¾ inch surgical incision in the left ante-cubital fossa. In the right lower quadrant is a flat, old healed scar.

"Body opened by usual midline incision. Panniculus 1 inch. There is a haemorrhagic fluid filling the lower half of the peritoneal cavity. On the right side, there are some adhesions of the omentum to the scar in the right lower quadrant, above-described.

"Chest: Both pleura; cavities contain each, about three ounces of blood-tinged fluid.

"Right Lung: Surface is smooth, but dark purplish in color. The upper two lobes are fairly well aerated. The

lower lobes are deeply congested. All lobes are markely oedematous. There are no consolidations. No lumpiness. Bronchi and pulmonary vessels are natural.

"Left Lung: Surface is smooth; lower lobe dark purple in color. There are numerous petechial heamorrhages in the pleura in the lower lobe. There is one small haemorrhagic infarct measuring about 1 inch x 1 inch on the lower lobe.

"On section, both lobes are markedly oedematous. There is considerable frothy fluid in the bronchi. Pulmonary vessels are natural.

"Pericardium intact; contains normal amount of clear, serous fluid.

"Heart: Weighs 250 grams, normal in size and shape. Epicardial fat moderate. The musculature is firm, though somewhat pale, brown in color. There are no scars. No hypertrophies. The coronary vessels are natural. There is no chicken-fat on both sides. Valves are natural. Foramen ovale closed. There are numerous small yellowish atheromatous plaques in the first portion of the aorta.

"Abdomen: Mucosa of the Oesophagus is bile-stained.

"Stomach contains considerable coffe-ground material and bloody fluid. Mucosa shows numerous small haemorrhages.

"Pancreas is pale; otherwise natural, as to size, shape and configuration.

"Duodenum is natural.

"Small intestine is distended with liquid-brownish-green chyme. Mucoas natural.

"On the left side, there is considerable plastic exudate in the lumber region running upwards to the lower pale of the kidney, plastered on the posterior wall of the peritoneal cavity.

"Lying at the brim of the pelvis, free in the peritoneal cavity, between two coils of intestine is a portion of a foetus, which consists of the lower three cervical vertebrae, all the thoracix and lumbar vertebrae, the ribs of

the left side, and some loose tissue. The ribs on the other side, and the head are absent. This specimen measures about three inches in length and is mangled.

"Liver: Is normal in size; capsule smooth, pale. On section the cut surface is light brownish in color, but deeply congested. The architecture is otherwise normal.

"Gall bladder contains thick bile; mucosa is natural.

"Spleen: Is increased in size; weighs 180 grams; capsule is smooth, gray. On section, it is deeply congested. Moderately soft. Malpighian bodies are faint.

"Adrenals: Are natural.

"Kidneys: Normal in size; capsules strip readily, leaving smooth surfaces. On section the cortex is pale. Madulla is congested. Markings are distinct. Relationship of cortex to madulla is one to three. Pelves and urethers are natural.

"Pelvis organs dissected out en masse.

"Rectum: Is natural.

"Bladder contains a few cc. of cloudy urine.

"Vagina is natural.

"The cervix is soft, and the external os is patulous, admits a probe which is ½ inch in diameter, readily.

"Uterus measures from the fundus to the cervix 4 inches vertically, and 3¾ inches horizontaly, and 1½ inches anterior-posteriorly.

"The fallopian tubes are natural.

"Ovaries are normal in size. There is a corpus luteum about 3.4 inches in diameter in the left ovary. Right ovary is natural.

"At about the middle of the posterior surface of the uterus is a small fibroid, which measures about one inch by 1.2 inches x ¾ inch and is attached to the uterus by a rather broad peadacle. On the anterior surface of the uterus about ½ inch below the uppermost portion of the fundus is an irregular perforation, which readily admits the index finger; measures about ½ inch to ¾ inch in diameter. It is roughly round in shape; the edges are

necrotic, and ragged and from it there protrudes some blood-clot. The perforation above-described, penetrates the entire thickness of the anterior uterine wall, and there is some adherent placenta and membranes at the right fornix of the uterus. The remaining portion of the fundus of the uterus seems to be denuded of endometrium. There is some subendometrial haemorrhage in the internal os, which is also dilated and readily admits a finger-tip. The walls of the uterus are soft and oedematous."

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1944

No. .....

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JOSEPH NISONOFF,

*Petitioner*,

against

THE PEOPLE OF THE STATE OF NEW YORK.

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**PETITION FOR DIMINUTION OF THE RECORD BY DISPENSING WITH THE FILING OF TEN ADDITIONAL COPIES OF THE PRINTED RECORD**

*To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

Your Petitioner, JOSEPH NISONOFF, respectfully prays, in connection with the foregoing petition for *writ of certiorari* that the rule of this Court requiring the filing, together with the petition for the *writ of certiorari*, of ten copies of the record in the court below, in addition to the certified copy of the same, be suspended, and the filing of such ten additional copies dispensed with. And in support of the said petition, your Petitioner respectfully shows to this Honorable Court the following facts:

1. The sole question presented on this application is the question of the admission in evidence of a certain document, to wit: the report of a medical examiner, who was not called as a witness at the trial, of an autopsy made by him. The said document is printed as an appendix to

the brief accompanying the foregoing petition for a *writ of certiorari.*

2. As can be seen from the opinion of the Court of Appeals of the State of New York, which is also printed as an appendix to the brief in support of the petition for a *writ of certiorari,* the constitutional question involved in the admission of the said document is not connected with or dependent upon any other matter which appears in the record, and there is no reference whatever in the opinion of the Court of Appeals to any other evidence or any other matter whatsoever appearing the said record. Your Petitioner therefore verily believes that the said record is not necessary for the determination of the question raised upon this application, nor would the additional copies be of use in the examination and consideration of said question.

3. There are only four copies of the said record available to your Petitioner, besides the certified copy which is intended to be filed with this petition, and your Petitioner is therefore not in a position to furnish more than the said four copies, which said four copies he is ready to file if the Court should feel that they might be of some use.

4. The printed record, as the Court may see from the certified copy of the same, contains over a thousand printed pages, and it would cost more than $1,000 to print the same. Your Petitioner is a poor man, actually confined in jail since April 20, 1945, and it would be a great hardship upon him if he were required to print additional copies of the record.

Wherefore, your Petitioner respectfully prays that an order be made by this Honorable Court, directing the diminution of the record by dispensing with the filing of ten additional copies as required by the rules of this Court.

Dated: New York, May 25, 1945.

Louis B. Boudin,
Attorney for Petitioner.